No. 90-7675

FILED
AUG 23 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE CLARENDON FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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August 23, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICI CURIAE

Pursuant to Rule 37 of this Court, the National Association for the Advancement of Colored People ("NAACP") and The Clarendon Foundation respectfully submit this brief amici curiae in support of Respondent, City of St. Paul, Minnesota. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The NAACP is a non-profit corporation with substantial membership nationwide. The NAACP has sought throughout its history to promote goodwill and mutual understanding among all Americans and to combat racial hatred and racially motivated violence. Since formation of the Ku Klux Klan shortly after the American Civil

War, the "burning cross" has been an integral part of white supremacist intimidation tactics and terroristic acts. The NAACP's fight against the commission of such acts is legendary and the organization has played a pivotal role in thwarting conduct of this nature.

Recently, however, there has been a resurgence in bias-motivated acts of intimidation and terrorism against blacks and other racial and ethnic minorities. Ordinances prohibiting bias-motivated disorderly conduct are necessary if efforts to combat racial violence against minorities are to continue successfully.

The Clarendon Foundation is a non-profit, non-partisan legal foundation concerned with significant legal issues related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The Foundation participates in various forums in cases where the resolution of constitutional issues may be aided by philosophical and historical analyses in addition to case law and public policy considerations. The Clarendon Foundation is committed to an on-going review of the basic tenets of our constitutional government, in the spirit of George Mason's admonition that ". . . no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principles."

The instant case raises questions of paramount significance to the public interest. We believe the perspective of the NAACP and The Clarendon Foundation will complement Respondent's brief and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

The wise resolution of this case, whatever the contours of its constitutional dimension may be, requires that it not be divorced from the concrete facts which underlie it. Distilled to its factual core, this case is about a young white man who, with his cohorts, burned a cross under

cover of darkness on the front lawn of the only black family in his neighborhood.

In his brief, Petitioner intones principles of freedom of speech with which, in the abstract, no one will disagree. But the State of Minnesota was not indulging in theory when it charged Petitioner with a violation of the ordinance in controversy. It was dealing with what can only fairly be described as an act of terrorism. This conduct cannot rationally be viewed as protected by the First Amendment.

The malicious cross burning at the core of this case is "expressive conduct" only in the most perverse sense of that fundamental idea. Such activity is unprotected because (1) it is not a genuine expression of opinion and (2) it is wholly at odds with other social values which must be considered in any thoughtful analysis of civil liberties, including the right of free speech.

St. Paul City Ordinance Section 292.02 plainly includes within its scope the cross burning on the lawn of the complainant, and thus proscribes a constitutionally regulable act. Application of the overbreadth doctrine, which is the sole predicate of Petitioner's appeal, would work an injustice by infringing upon the complainant's own civil liberty. Petitioner's interpretation of the specific facts of this case expands that doctrine to an illogical extreme and does not provide a sufficient ground for overturning the ordinance.

Nevertheless, consistent with the structure of current overbreadth analysis, the Minnesota state supreme court provided an adequate construction of Section 292.02 in upholding its constitutionality. Because the ordinance expressly regulates cross burning on private property and the proscription of that specific conduct is lawful, there is a core of constitutionally regulable conduct to which the ordinance may be narrowed.

The Petitioner has asked the Court not to create any new exceptions to the First Amendment protection of free speech. We ask that the Court not legitimize political and religious persecution by making it a constitutional right.

ARGUMENT

I. THE BURNING OF A CROSS ON THE PRIVATE PROPERTY OF A BLACK FAMILY IS NOT CONSTITUTIONALLY PROTECTED SPEECH

Creating an exception to the First Amendment for a case in which the listener might be seriously offended by certain expression is problematic because it is indistinguishable in principle from cases of protected speech. While taking many offensive forms, for example, expression that "invite[s] dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger," has properly been protected from regulation by the government. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

Nevertheless, principles derived over time for differentiating protected from unprotected expression make clear that the ill conduct involved in this case falls squarely outside the protected zone. The circumstances in which certain activities are viewed as unprotected speech may be analyzed along two dimensions: (1) the extent to which the speech or conduct actually contains elements of *bona fide* "expression," and (2) whether other significant social values are implicated.

A. The Conduct At Issue In This Case Lacks The Elements of Genuine Expression

Free speech has value only in the context of dialogue. Communication that concerns beliefs and ideas, and involves persuasion is the legitimate concern of the First Amendment. The law has traditionally treated as unprotected those types of "utterances [that] are no essential

part of any exposition of ideas [and] of . . . slight social value as a step to truth." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

Unprotected expression includes misrepresentations, "fighting words," obscenity, and libelous statements.[1] *Id.* at 571-72. Such expressions are properly viewed, in the words of one observer, as "projectiles" whose ill effects cannot be averted by more speech, rather than as part of an exchange of views. L. Tribe, AMERICAN CONSTITUTIONAL LAW 837 (2d ed. 1988). These are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572.

In assessing a regulation of expression, the law has generally taken into account the harmfulness of the types of messages being conveyed, and the ability or inability of more speech to cure the harm. For instance, advocacy of "imminent lawless action" is unprotected in large part because such speech may result in a crime before other speakers have had a chance to respond. This distinction between protected and unprotected speech is summarized in a now famous statement from *Cantwell v. Connecticut*, 310 U.S. 296 (1940) where the Court observed:

> Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Id. at 309-10.

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[1] Petitioner relies upon recent flag burning cases and rejects the relevancy of the "fighting words" theory to this case. It should be obvious, however, that flags are burned to attack political ideas—ideas espoused by political leaders or political parties. Flag burning is a distinctly political demonstration. Crosses are burned to terrorize and intimidate others. The "fighting words" doctrine is relevant to this case because it addresses attacks upon individuals, rather than ideas.

Moreover, it is well established that the government may, without running afoul of the First Amendment, protect targeted listeners from offensive speech when the speaker intrudes on the privacy of the home, or even where a "captive audience" cannot otherwise practically avoid exposure. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). In other words, the government's ability to "shut off discourse solely to protect others from hearing it depends upon a showing that *substantial privacy interests are being invaded in an essentially intolerable manner.*" *Cohen v. California*, 403 U.S. 15, 21 (1971) (emphasis added).

The burning of a cross on the lawn of a black family late at night is a classic instance of the type of conduct which may be constitutionally regulated under these limiting principles. A cross burning executed in this manner is not the exposition of an idea, but a wanton and volatile act intended to terrorize an innocent family. It is difficult to conceive of an activity that more substantially and flagrantly invades one's privacy in "an essentially intolerable manner." *Cohen*, 403 U.S. at 21-22.

Persecution of minorities is no more a type of political opinion to be accorded free speech protection, than pornography is to be considered a form of protected artistic expression. Supremacist speech and other forms of persecution are no less harmful to the community than is pornography. Both undermine basic human dignity. *See New York v. Ferber*, 458 U.S. 747 (1982).

Accordingly, the conduct in question cannot be viewed as constitutionally protected speech. The principles of civil liberty invoked by Petitioner, for all their cherished value in other contexts, are simply not applicable to this conduct. Inasmuch as Section 292.02 plainly proscribes this conduct, it is a valid regulation to that extent.

B. Other Significant Social Values Affect the Assessment of Petitioner's Conduct

Even if it were reasonable to consider the cross burning in this case as marginally expressive conduct, it is not an activity which the state is required to indulge for the sake exclusively of Petitioner's right to free speech. Petitioner impliedly views this interest as categorically superior to other social values, as if these values must be relegated to lesser status if Petitioner's civil liberty is not to be unlawfully compromised.

This is a false dynamic. One need look no further than John Stuart Mill, one of the staunchest defenders of civil liberties, to find the crucial theoretical distinction missing from Petitioner's analytical approach. Civil liberty as mere *license*, which Mill condemned, indiscriminately includes intolerable forms of behavior where liberty becomes a *carte blanche* for a person to act as he pleases. In contrast is the ideal of civil liberty as *independence*, or the right to express one's individuality without fear of governmental sanction. Liberty as license is one-sided, ignoring the effects of one person's actions upon the well-being of others. Liberty as independence, by comparison, necessarily implies that the individuality of others must always be afforded equal protection and concern. As Mill succinctly put it, "It is desirable, . . . that in things which do not primarily concern others, individuality should assert itself." J.S. Mill, ON LIBERTY 56 (A. Castell ed. 1947).

Social values such as the dignity of individuals, public safety or civil peace and order are considerations which may influence our assessment of how and to what degree the civil liberties of all concerned are affected. Properly viewed, a law such as St. Paul Ordinance Section 292.02 does not threaten, but is necessary to protect, the political independence of victims of hate crimes. It is not mutually exclusive with Petitioner's lawful exercise of his own civil liberty.

Indeed, the Court has held that the protection of the safety and the property rights of its citizens is not only a proper subject for the exercise of a municipality's authority, but that a local government would be remiss if it did not provide these fundamental protections. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Court stated:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety . . . of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend . . . .

Id. at 574.

Petitioner implicitly embraces "a conception of freedom of speech so rigid as to tolerate no concession" to the other significant social values at stake in this case. *Terminiello*, 337 U.S. at 7 (Jackson, J., dissenting). Because this misses the essential purpose of civil liberty, Petitioner's argument for his right to free speech is fundamentally ill conceived and must fail.

II. PETITIONER'S RELIANCE UPON THE OVERBREADTH DOCTRINE IS MISPLACED

A. Introduction

The linchpin of Petitioner's brief is that Section 292.02 is unconstitutionally overbroad. Petitioner's argument is that although no constitutionally protected conduct of his own could immunize him from prosecution, the language of the ordinance must be declared inoperative because the generality of the language might result in situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so.

The First Amendment overbreadth doctrine allows a challenge to the validity of a statute on its face only if the law is "substantially" overbroad. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799-801 (1984); *New York v. Ferber*, 458 U.S. at 769-73. Nevertheless, an attack based upon overbreadth will not succeed if the statute in question is "readily subject to a narrowing construction by the state courts." *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 55 (1976); *Erznoznick v. City of Jacksonville*, 422 U.S. at 209. Moreover, "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation [the Court takes] 'the statute as though it read precisely as the highest court of the State has interpreted it.'" *Wainwright v. Stone*, 414 U.S. 21 (1973). A statute interpreted by the state court to mean something clearer or narrower than its literal language allows the state to prosecute a litigant for violation of the statute. *Cox*, 312 U.S. at 572-73.

In the view of the Minnesota state supreme court, Section 292.02 could be "narrowly interpreted to reach only unprotected conduct." *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991). The court was of the view that the ordinance should be interpreted "so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the First Amendment does not protect." *Id.* at 510-11. Accordingly, said the court, "the ordinance is a narrowly tailored means towards accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and orders." *Id.* at 511.

As discussed below, the reach of the overbreadth argument has been extended far beyond its reasonable application, and the continuing utility of the doctrine should be re-evaluated by the Court at this juncture. Nonetheless, even applying the overbreadth doctrine in its present form, Petitioner's challenge is unavailing.

B. This Court Should Reassess the Overbreadth Doctrine

Serious problems with the overbreadth doctrine were noted by several Justices of this Court nearly twenty years ago. In a series of cases in the early 1970s, the Court reversed convictions involving laws proscribing abusive language. In *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court invalidated a Georgia ordinance primarily because it had been previously applied to "utterances where there was no likelihood that the person addressed would make an immediate violent utterance." The Court in *Lewis v. New Orleans*, 415 U.S. 130 (1974), ruled that vulgar or offensive speech was protected under the First Amendment. Because the statute punished "opprobrious language," it was deemed by the state court to embrace words that do not " 'by their very utterance inflict injury or tend to invite an immediate breach of the peace.' " *Id.* at 133.

Dissenting in both cases, then-Chief Justice Burger and Justices Blackmun and Rehnquist complained that the majority invoked vagueness and overbreadth analysis

> indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing that speech.

Lewis, 415 U.S. at 137-38. In both cases, the dissenting Justices focused upon the concrete facts before the Court, warning of a reflexive reliance upon the abstract analysis inherent in overbreadth review. They complained that the majority had relegated the facts to "footnote status, conveniently distant and in less disturbing focus. This is the compulsion of a doctrine that reduces our function to parsing words in the context of imaginary events." *Lewis*, 415 U.S. at 138. Moreover, they reasoned:

> [o]verbreadth and vagueness in the field of speech have become result-oriented rubber stamps attuned to the easy and imagined self assurance that 'one man's vulgarity is another's lyric.'

Lewis, 415 U.S. at 141.

The application of the overbreadth doctrine in these cases exemplified "[t]he extreme to which we allow ourselves to be manipulated by theory extended to the end of logic." *Lewis*, 415 U.S. at 137.

In the instant case, the identified overbreadth is not incurable and would not taint all possible applications of the ordinance. The invocation of overbreadth analysis here must not be allowed to cloud the disturbing and compelling facts of this case. Petitioner's conduct was not expressive in any tolerable sense, but an act clearly intended to intimidate and terrorize.

The inherent danger of the overbreadth doctrine can be seen against the background of the rationale for the principle of standing from which the doctrine springs.

> [T]here are sound reasons for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments. 'Every tendency to deal with constitutional questions abstractly,' Professor Felix Frankfurter wrote a generation ago, 'to formulate them in terms of barren legal questions, leads to dialectics, to sterile conclusions unrelated to actualities.'[2]

A.M. Bickel, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS 115-16 (1962).

In *Gooding* and *Lewis*, Justice Powell insisted upon the importance of context in decisionmaking. Dissenting in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), he suggested that *Chaplinsky* be extended to the "willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Id.* at 906. He urged

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[2] F. Frankfurter, "Advisory Opinions" in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 475, 478 (1930).

that whatever the scope of the "fighting words" doctrine, overbreadth analysis was inappropriate in such cases and he thought it unlikely that such statutes deter others from exercising First Amendment rights. *Id.* at 909.

The factual context of this case is the crucial element to its proper resolution. Losing sight of this specific focus will result in the expansion of current overbreadth jurisprudence to an illogical extreme. Accordingly, the Court should take this opportunity to reassess the wisdom of the overbreadth doctrine in its present formulation.

C. The Minnesota State Supreme Court Provided A Properly Limited Interpretation of Section 292.02

Petitioner asserts that the St. Paul ordinance is not susceptible to a limiting construction and, therefore, that the state supreme court's limiting gloss was *a fortiori* futile. As put by the Petitioner:

> The ordinance has no core of constitutionally proscribable conduct since it is not possible to define a precise category of expression protected by the First Amendment which can be clearly stated to fall outside the reach of this narrowly construed ordinance.

Petitioner's Brief at 6.

Petitioner relies on the line of cases exemplified by *Thornhill v. Alabama*, 310 U.S. 88 (1940), and more recently by *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Those cases held that an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face. Such a challenge is countenanced on the theory that the statute threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial," the law may not be

enforced against anyone, including the party before the court, "until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

A narrowing construction of a statute may obviate any challenge on overbreadth grounds. Interpretation of a statute by a state court may "substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985).

As discussed in Section II, the Minnesota state supreme court authoritatively construed the challenged ordinance, concluding that it "can be narrowly interpreted to reach only unprotected conduct. *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d at 509. Petitioner's act of burning a cross under cover of darkness on the complainant's private property is not expressive conduct entitled to First Amendment protection. Petitioner's act against the complainant plainly involved "plac[ing] . . . on private property . . . a burning cross" which Petitioner knew or had reason to know would arouse "anger, alarm, or resentment in others on the basis of race." *Id.* at 508. His conduct therefore falls within the express language of the ordinance, as narrowed by Minnesota's highest court.

For this reason, Petitioner's assertion that Section 292.02 has no core of constitutionally proscribable conduct is incorrect. The analytical error which leads Petitioner to such a conclusion can be found in his rationale as to why the core conduct is not regulable. This is so, Petitioner argues, "since it is not possible to define a precise category" of protected expression which falls "outside the reach of this narrowly construed ordinance." Petitioner's Brief at 6. But that is a *non sequitur*. Whether Section 292.02 can be narrowly construed to constitutionally proscribe the conduct at issue is not logically related to the varieties of non-regulable conduct which

fall outside the ordinance's scope. For the very purpose of a narrowing construction is to save the ordinance from its overbroad sweep. Petitioner is arguing, in effect, for an expanded overbreadth rule which no longer countenances a state court's authority to impose a limiting construction.[3]

CONCLUSION

Petitioner's literary allusion to the oft-quoted exchange between Sir Thomas More and young Roper is an inspiring reference, but it seriously mistakes the nature of Petitioner's argument. To be sure, the civil liberties guaranteed by the Constitution must never be compromised simply to "catch the Devil"—to curb behavior which the majority finds offensive. This case, however, is not about Petitioner's lawful exercise of a civil liberty, but about his abuse of that liberty and the horrible impact of his conduct upon the civil liberties of innocent victims. A more apt reference for the logic advocated by Petitioner can be found in Socrates' conversations with the Sophists, whose reasoning the sage exposed as clever but fundamentally specious, and an impediment to justice. Plato, "The Sophist," in PLATO: THE COLLECTED DIALOGUES 957-1017 (E. Hamilton, H. Cairns eds. 1961). Too much is at stake in this proceeding to subject the civil liberties of real victims to the consequences of theory gone awry.

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[3] In this connection, a key focus of Petitioner's overbreadth argument is that the language of the ordinance requires actual or imputed knowledge that the act in question "arouses anger, alarm, or resentment in others." The knowledge requirement is an element of the crime. Knowledge of the harm being inflicted demonstrates a criminal intent to attack and injure another human being.

Accordingly, the decision of the Minnesota supreme court should be affirmed.

Respectfully submitted,

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August 23, 1991